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IN THE

Supreme Court of the United States

October Term, 1945.

No. [redacted] 37

EDNA W. BALLARD and DONALD BALLARD,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF.

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TABLE OF AUTHORITIES CITED.

	PAGE
Associated Press v. National Labor Relations Board, 301 U. S. 103	2
Cantwell v. State of Conn., 310 U. S. 295	11
Dart, Ex parte, 172 Cal. 47, 155 Pac. 63	3
Follett v. Town of McCormick, 321 U. S. 573, 64 S. Ct. 717	4, 5
Ford v. United States, 273 U. S. 593	8
Gray v. United States, 14 F. (2d) 366	13
Jones v. City of Opelika, 86 L. Ed. 1174, 319 U. S. 103	2, 4
London Guarantee v. Woelfle, 83 F. (2d) 325	11
Murdock v. Pennsylvania, 319 U. S. 105	4
Pelts v. United States, 54 F. (2d) 1001	6
Pharr v. United States, 48 F. (2d) 767	12
Pierce v. United States, 86 F. (2d) 949	12
Randle v. United States, 113 F. (2d) 945	13
Salinger v. United States, 272 U. S. 542	8
Schmidtberger v. United States, 129 F. (2d) 390	13
Sunderland v. United States, 19 F. (2d) 202	12
Turk v. United States, 20 F. (2d) 129	14
United States v. Ballard, 322 U. S. 78	11
United States v. Holt, 108 F. (2d) 365	13
United States v. Wexler, 79 F. (2d) 526	13
Volkmor v. United States, 13 F. (2d) 594	10, 12

IN THE

Supreme Court of the United States

October Term, 1945.
No. 782

EDNA W. BALLARD and DONALD BALLARD,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF.

The Government concedes that important questions of constitutionl law not as yet determined by this court are involved in this proceeding. Its arguments are addressed primarily to the proper determination of those questions rather than as to whether or not the writ should properly issue. This is true as to the interpretation of the indictment. It is also true as to the misconduct of the prosecution, for, in that connection, the Government admits that the comments on the failure to produce physical evidence of supernatural events were improper under the decision of this court, and disagrees with petitioners only as to the prejudicial effect thereof. It also concedes the jury was improperly selected and again places its defense to that point upon the ground that prejudice was not shown. In this connection it does not claim that this

court has ever determined whether discrimination against a sex in the selection of a jury violates a defendant's constitutional rights. Throughout its brief in opposition to the petition, it wholly fails to disprove the right of the petitioners to the issuance of the writ, but rather argues on the merits as to how the constitutional questions should be determined concerning which the petitioners ask a hearing.

It does attempt to prevent this court from reviewing the constitutionality of such an indictment as here involved on the assumption that petitioners are guilty and that the determination should await the conviction of innocent defendants. Passing for the moment the assumption of guilt on the part of the petitioners, no more insidious argument can be made as far as the protection of religious liberty is concerned. This court has been constantly vigilant in preserving the rights of religious liberty as provided under the First Amendment. The course suggested by the Government is contrary to the past action of this court and its attitude in connection with religious matters. Whenever religious liberty, or any of the important liberties guaranteed by the Constitution, have been questioned, this court has been zealous in preserving these rights and affording protection. It has repeatedly stated that freedom of religion and of speech are in a preferred position. *Jones v. City of Opelika*, 86 L. Ed. 1174, 319 U. S. 103. It said in *Associated Press v. National Labor Relations Board*, 301 U. S. 103, if the people desire to preserve the liberties granted to them by the First Amendment, "* * * let them withstand all beginnings of encroachment. For the saddest epitaph which can be carved in the memory of a vanished liberty is that it was lost because its pos-

sessors failed to stretch forth a saving hand while yet there was time." Liberties are not lost through comprehensive legislative enactments abolishing them. Slight encroachments if tolerated are then followed by greater encroachments predicated upon the acceptance of the first. As is said by the Supreme Court of California in *Ex Parte Dart*, 172 Cal. 47, 155 P. 63, at 66: "* * * it is for every court to see that that (religious) liberty is not encroached upon and that freedom gnawed and impaired by any experimental legislation however well meant." The decision of the Circuit Court in this case adopting, as it does, the dissenting opinion of this court on the earlier hearing, clears the path for the prosecution of religious sects on the basis that they do not have sufficient belief in their credo. It is rediculous to argue that because the Government has stayed its hand for four years no one need be concerned about this encroachment on religious liberties. Whether one or fifty improper questionable prosecutions occurred in a period of years should not, in any wise, justify the approval of an infringement upon the rights to religious liberty. It is just as logical to assume that this court's prior opinion has already had the salutary effect in a period of less than two years of staying the Government's hand in (as Justice Jackson so aptly puts it) "this business of judicially examining other people's faiths." Nor is the Government justified in predicating an argument upon the assumption that the petitioners are guilty. We are prepared to argue the sufficiency of the evidence to support the decision, but that point is not up for consideration in the petition in the case at bar. The Government should not attempt to prejudice a petitioner's case by the assumption in which it indulges. In this connection it seeks to confuse the re-

marks of this court by asserting that none of the Justices "entertained any doubts that these particular defendants were guilty of gross fraud." We submit that this is not the attitude nor the expressed statement of this court. More accurately the Justices expressed the thought that the religious principles and tenets advanced by petitioners "might seem incredible if not preposterous to most people." It is submitted that this was by way of illustration of the danger of permitting those of orthodox views to pass upon the unorthodox.

I.

The Government claims that *logically** a prosecution for falsely pretending to believe in religious concepts in no way infringes on the right to belief and therefore upon religious liberty. This does not answer the contention that the prosecution would result in an infringement upon the right of religious liberty. That such answer is insufficient is illustrated by reference to this court's decisions in the colporteur cases (*Follett v. Town of McCormick*, 321 U. S. 573, 64 S. Ct. 717; *Murdock v. Pennsylvania*, 319 U. S. 105, *Jones v. Opelika*, 319 U. S. 103.) The persons there involved were not prohibited from selling their literature. There was no question but that the ordinances regulating the sale of literature were within the power of the community to enact. The tax was not exorbitant (40¢ per day on an annual basis in the *Follett* case and the preacher was a resident of the community). *Logically* they could be prosecuted but this court in every such case has looked to the effect of such logically permissible prose-

*All italics herein ours unless otherwise indicated.

cution upon the religious liberty of those involved. Finding that such effect was "the imposition of a censorship or a previous restraint" on the exercise of right to religious freedom and would "inevitably tend to suppress its exercise," the ordinances were declared invalid. Likewise, in this instance, this court should not merely pass upon the logical nature of the prosecution of a religious leader for not believing in the creed professed. It should inquire into the effect of such a prosecution upon religious freedom and on making such inquiry it should not test the application of the mail fraud statute to representations concerning religious belief by purely commercial considerations. This court has held that where the matter is religious rather than commercial, the constitutionality may not be measured by standards governing the sale of wares. (*Follett v. Town of McCormick, supra.*) Preachers or persons engaged in religious matters are not considered as in a commercial undertaking merely because they are dependent upon their calling for a living. (*Follett v. McCormick, supra.*) The various churches are constantly raising funds for the maintenance and propagation of their religion. The practice is recognized as an integral part of religious movements. If it is probable that an infringement will result, as pointed out by Justice Jackson and by Judge Denman in his dissent, and by petitioners, then it is not an answer that logically mental state is a fact concerning which fraudulent representations can be made.

In this connection we submit great consideration should be given to the opinion of Judge Denman that Congress never intended the mail fraud statute to permit a prosecution of a religious group on an indictment such as the

one here involved. It was obviously enacted to curb fraudulent commercial practices, and assuming a literal reading of the language contained in it may be sufficient to warrant a prosecution for lack of belief, as the Government claims is logical, we submit it is not the purpose or the intention of the Act to encompass the prosecution of religious movements on any such theory as the Government asked this court to countenance. It was never the intention of the Congress that the mail fraud statute be used to prosecute religious groups for lack of belief. We are confident this court will not permit its use to whittle away religious freedom.

Justice Jackson does not (as claimed by the Government) overlook the fact that the crime condemned by the mail fraud statute is the use of the mails in execution of a "scheme" and, therefore, that solicitation of money without belief is not a crime under that statute. It is perfectly obvious that if it is determined that lack of belief can be made the basis for fraudulent representations in a mail fraud indictment, every preacher or religious leader solely engaged in propagating a religion could be found to be engaged in a scheme to defraud if a jury found that he lacked sufficient belief. True, every representation is not sufficient to constitute a scheme to defraud, but it has been held that all that is required to establish a scheme is that there besome continuity in the representations "so that they can be said to be part of the continuous means by which the business is carried on." (*Pelts v. U. S.*, 54 Fed. (2d) 1001.) The propagation of any religion would involve such continuity of representations as to fully satisfy the law in regard to proof of a scheme if a jury found the representations fraudulent.

The Government urges that it is proper to charge a total lack of belief of religious matters since if there is a lack of belief freedom of believing as one chooses is not being denied. The weakness of this argument is exposed by the fact that in a religious prosecution the determination of lack of belief must entail a consideration by a jury as to whether the asserted belief is believable or unbelievable in the mind of the jury.

II.

The Government again argues in connection with the amendment to the indictment that the inclusion, after each charge of false representation, of the allegation that the petitioners "well knew" the representation to be false amounted to two separate charges; one of false representation concerning doctrine and the second a false representation as to their belief. This argument would make every indictment or every civil allegation of fraud of a dual aspect. Instead of being one component charge of fraud necessarily including the allegation of intent or scienter, the Government argues that such charge or allegation constitutes the two separate things above mentioned. We have fully stated our position that this is not the case. (Pet. pp. 43-47.)

We respectfully submit that the Chief Justice, in his dissenting opinion, misconceives petitioners' contention in this connection. It is not that eliminating one of two sets of false statements constitutes a fatal amendment to the indictment, but that the indictment herein contained *one set only* of allegedly false statements and that when that set was eliminated and the petitioners tried on the charge substituted by the trial judge through instructions during

the trial, such action constituted a fatal amendment. A comparison of what occurred in cases such as the *Ford* case (*Ford v. United States*, 273 U. S. 593) shows that it is an unwarranted extension of the rule there set forth to attempt to apply such rule in the case at bar. The precise nature of the indictment does not appear in the opinion in the *Salinger* case (*Salinger v. U. S.*, 272 U. S. 542); but a perusal of the description of the indictment in the *Ford* case and a comparison with the indictment in this case immediately discloses how unwarranted the extension of that rule to the present case would be. The indictment in this case contains *only one set* of alleged misrepresentations; they were eliminated by the court's instructions.

III.

The Government admits that the comments of the prosecution demanding physical proof of supernatural events was improper. (Government Brief p. 12.) This conduct, of course, together with the taunting and ridiculing of the petitioners' religious tenets, is basic in the petitioners' contention that the conduct of the prosecution violated due process and infringed upon the petitioners' right to religious freedom. Tacitly, at least, the conduct in ridiculing the religious concepts of petitioners as being unbelievable and taken from the funny papers is likewise recognized as improper. Considerable space is devoted to less important improprieties without a word concerning these, which justifies our assumption that the Government concedes them to be improper.

The defense of the conduct is predicated upon the alleged lack of prejudice. The decision of the Circuit Court of Appeals is not so predicated. It holds the conduct

proper. [R. 1637.] Nor does that court, as the Government states, hold that the arguments taken as a whole did not exceed the bounds of propriety. Specifically, that court states:

> "We discern *nothing* in counsel's argument on either side not fully within the concepts of honorable members of the American bar."*

It is this particular characterization of the argument which drew forth the following comment of the dissenting judge:

> "I further dissent from the court's characterization of such accumulating abuse of the process of federal or any Anglo Saxon prosecution as being fully 'within the concepts of *honorable** members of the American bar.' Though understandable and perhaps in individual instances excusable, it is not commendable conduct within the concepts of the factory, the forecastle of Lord Chesterfield's drawing room."

The Government attempts to support the judgment rendered but clearly concedes that the opinion of the court does not correctly state the law. While it is true that in certain cases the appellate court has refused a reversal on the ground that reversal was not warranted under the circumstances, this is the only case to our knowledge where a federal court places *a stamp of approval* upon such improper and intemperate statements and undignified conduct. The public reputation of judicial proceedings for fairness, integrity and dignity will most certainly irreparably suffer from doing so.

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*Emphasis Judge Denman's.

As to the contention that the erroneous conduct does not justify a reversal of the judgment, we submit the following:

1. If this court does not see fit to entirely prevent the prosecution of leaders of religious sects on the theory their belief in their credo is insufficient, it should most certainly hold the Government to strict accountability as to the conduct of the trial. It should not allow one's right to religious liberty to be trampled upon and the action upheld on some theory that prejudice was not shown.

2. The prejudicial effect of the misconduct was not obviated by statement of the court relied upon by the Government. Where violations are flagrant it is recognized that admonishing the jury and even reproving counsel will not dissipate the harm which has been done. (*Volkmor v. United States,* 13 Fed. (2d) 594.)

The statement of the court was made in ruling upon an objection interposed that a remark of the prosecution was improper and that the jury should be instructed to disregard it. It was preceded by another statement in which the court said that he assumed if he sustained the objection the Government would thereafter be stopped from referring to the defendants in other than complimentary terms. [R. 1189.] Read in the light of what occurred the statement relied upon amounted to a rebuff of counsel for defendants and was weak as an admonition. It, in effect announced to counsel his intention not to properly limit arguments and after such a statement it is not fair to assume that defendants' counsel did not consider the argument prejudicial to their clients because they did not make further objection. The court, having announced that argument would not be restricted, further

objection could only have the effect of damaging defendants' case in the eyes of the jury. (See *London Guarantee v. Woelfle,* 83 F. (2d) 325.)

Including as it does the statement that the jury will disregard extreme statements and "pass judgment upon the evidence as interpreted by counsel" it constituted, as stated by Judge Denman, license to comment upon and interpret divine, supernatural facts. The court had previously ruled that such interpretation would be a proper matter for argument and determination by the jury. [Dissenting Opinion of Judge Denman; R. 1647.] Any curative effect the admonition might have had was offset by the final statement contained in it.

3. This court has recognized that in matters of religion sharp differences exist in this country (*Cantwell v. State of Conn.,* 310 U. S. 295); and that there is a violence of disagreement among religious sects. (*U. S. v. Ballard,* 322 U. S. 78.) Arguments directed to the heightening of passion and prejudice in this connection are precisely of the type condemned in the *Veirick* case as highly prejudicial and offensive to the dignity and good order with which court proceedings should be conducted.

4. The improper conduct was not an isolated instance. It was neither of one character nor rare. Pages 22 to 28 of petitioners' brief are devoted almost entirely to instances of conduct of the type which the Government either directly or tacitly admits are improper. This excludes denunciation and other appeals which petitioners contend are improper but which the Government does not concede to be. It is recognized in some cases that a single instance of misconduct may constitute reversible error while in other circumstances slight transgressions may be

corrected. (*Pierce v. U. S.*, 86 Fed. (2d) 949; *Pharr v. U. S.*, 48 Fed. (2d) 767.) But where the presentation is permeated with prejudicial matter the judgment should be reversed. (*Sunderland v. U. S.*, 19 Fed. (2d) 202.) This is particularly true where the objectionable matter is not through inadvertence but is rather intentional abuse. (*Volkmor v. U. S.*, 13 Fed. (2d) 594.)

The Government seeks to uphold the use of invectives in this case on the ground that they were used as a proper characterization of the petitioners or descriptive of the crime charged. There is apparently considerable difference of opinion among the Circuit Courts in this connection. We have cited a number of cases holding that under the rule that it is the duty of counsel to discuss the facts, denunciation has no place in the argument (Pet. p. 31) and we believe they state the correct rule but in any event the cases cited by the Government do not in any wise support the claim that the denunciation *in this case* was proper. They can be readily differentiated. Here there was a studied and continual abuse and denunciation of the petitioners. They were called "cheats," "charlatans," "religious racketeers" [R. 1540, 1283], "adept prevaricators" [R. 1244] "glib prevaricators" [R. 1318], "the most successful fakers in the knowledge of the history of fakery" and their religion a "flim-flam scheme" and the "Ballard racket" [R. 1178]. They were characterized as "cheats," "charlatans" and "religious racketeers" on one occasion not because of a claim that the evidence proved them to be such but, according to counsel, *because they could not make their religion work on themselves* [R. 1540]. The latter remark would not even be proper under the Government's contention that there is such a

thing as permissible denunciation. An examination of the cases cited by the Government discloses that in most of them the contention that there was misconduct related to isolated remarks.[1] We most certainly cannot agree that "much stronger denunciations of defendants have been upheld," citing *U. S. v. Wexler*, 79 F. (2d) 526, 530; *U. S. v. Holt*, 108 F. (2d) 365, 369.[2]

The Government claims that the prosecution was justified in taunting the petitioners for not proving divine healing by producing witnesses who had actually been cured on the theory that the statement was pertinent to the issue of good faith. Clearly this is not true for two reasons. Such proof would not be permissible under the court's instruction. They were under no more obligation, in view of this instruction, to produce witnesses who had been cured to save themselves from such taunts than to satisfy the prosecution's demand that they should

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[1]Thus in *Randle v. U. S.*, 113 F. (2d) 945, 950, *the sole complaint* was that in answer to a query by defendant's counsel Government counsel stated: "I intend to show that she (the defendant) is nothing but a fraud from beginning to end." In *Schmidtberger v. U. S.*, 129 F. (2d) 390, 392, a defendant who was charged with illegal sale of narcotics was characterized on *one occasion* as a peddler of narcotics, the Government having shown that he conveyed the narcotics from his office to a hotel for sale. In *Gray v. U. S.*, 14 F. (2d) 366, 367, a defendant charged with sale of alcoholics was characterized on *one occasion* as a bootlegger. Even here the court said "* * * This character of argument to a jury should be omitted."; and, further, that the argument should be directed to a presentation of the facts.

[2]In the *Holt* case the defendant, who was mayor of a city and charged with fraud, was on *one occasion* called "a despicable mayor." [p. 369.] In the *Wexler* case there were only two instances of denunciation. On one occasion it was stated that the defendant had spent his entire life cheating, robbing, assaulting and worse, and, on another, that he had never earned an honest penny in his life.

have been told about and had an example of precipitation "shown us" in court [R. 1303; Dissenting Opinion, R. 1644]. Secondly, it was the Government who claimed that representations in connection with healing were untrue and it was for the Government to prove the allegation if the subject was pertinent to this trial—not for the defendants to disprove it. The only evidence offered by the Government in this connection was to the effect that many persons had claimed to have been healed through belief in the tenets of the I AM [R. 579].

A comparison of cases cited by petitioners [Pet. p. 37] with those cited by the Government (Brief in Opp. p. 13) discloses that there is a sharp conflict with the Circuit Courts as to the propriety of urging a conviction on the ground that such conviction would serve as a warning to others. We submit that in view of the rule above mentioned that argument of counsel is for the purpose of discussing the facts, those cases holding such conduct improper state the correct rule; and that the court, in *Turk v. U. S.*, 20 F. (2d) 129, at 131, correctly points out that it is as fatal to a fair trial that a jury's verdict is based upon a wrong and unlawful reason, as that it was caused by incompetent evidence.

In this connection, and in connection with the other instances of misconduct objected to, we ask that the court bear in mind it is not necessary to petitioners' contention that any single instance would justify a reversal of the judgment. It is the cumulative effect of the varying and serious improprieties—jeering at petitioners' belief, asking for proof of supernatural intervention, denouncing the petitioners generally and because they cannot prove their belief on themselves, demanding

a conviction so that our soldiers will not have founght for naught, or because of a claim that poor people were defrauded, or as a warning to others, and the injection of allegedly personal knowledge of the prosecutor into his argument—which requires that the judgment be reversed. They were continued throughout the argument and at more than one session of the court.

The prejudicial nature of misconduct is for the court to determine from what occurred. It is not to be determined by surmising the reason certain defendants were acquitted. The prosecution manifestly directed its attention to the Ballards as is witnessed by the remarks of the prosecution to which objection is taken. Consequently, if the matter or prejudice is to be determined in this manner, we would suggest that the acquittal of some and the conviction of those against whom the Government continually used abuse, would indicate the presence of prejudicial effect rather than the absence thereof. In the first trial, on a similar indictment, there was no decision against the Ballards [Dissenting Opinion, R. 1653]. We presume a permissible surmise would be that the different outcome resulted from the manner in which the second trial was conducted. We suggest the foregoing only to illustrate the futility of attempting to determine the matter of prejudice in the manner suggested by the Government.

In determining whether, under the decisions, the misconduct in this case constituted reversible error, we submit two facts are significant. First, *in no case cited by the Government, or of which we have knowledge, other than possibly in the Berger case, does the opinion indicate that the record contained misconduct in degree or quantity that*

found in the record in this case. Second, *in every case where the misconduct was at all comparable the judgment of conviction was not permitted to stand.*

IV.

The Government does not claim that the jury was properly selected or that women were not intentionally and systematically excluded therefrom. It answers the petitioners' claim that their constitutional rights were violated solely with the contention that prejudice was not shown.

Petitioners' contention that discrimination in the selection of the jury violated their constitutional rights is not based upon a misconception of the *Glasser* case, as contended by the Government, nor are the portions of the *Glasser* case relied upon *dictum.* We clearly pointed out that the portions quoted in our brief had reference to the selection of women from the Illinois Voters League [Pet. p. 69]. This court stated, in that case, the essential elements to an impartial jury. We submit that what is said is not *dictum.* Glasser filed an affidavit in which he alleged certain facts were true in connection with the selection of the Grand Jury. The court first determined whether the facts stated in the affidavit, if true, would require the verdict to be set aside. The portions of the opinion quoted by petitioners were connected with this determination. When it concluded that those facts, if proved, would warrant a reversal it then looked to the sufficiency of the proof. We submit that under those circumstances the portion of the opinion directed to the sufficiency of the allegations of Glasser's affidavit are not *dictum.*

Is it not clear that the definition of an impartial jury is as applicable, whether the question is the exclusion of women or women belonging to a particular organization? When this court states in its opinion that a jury must be "a body truly representative of the community," "not the organ of any special group or class," and "a cross section of the communlty" the decision is governing irrespective of the nature of the discrimination which has occurred.

When it is admitted that of those qualified to act, all of one sex and approximately one-half of those qualified were arbitrarily excluded from the juries, they cannot qualify as impartial juries under that definition.

The Government contends that the exclusion of women in a case of this kind is not prejudicial. Our position in that connection is that set forth in the dissent of Judge Denman and in our petition [pp. 72-73]. The Government argues that on the trial of a man he could not complain that all men were excluded and consequently that a woman cannot complain if all women are excluded. We do not concede the premise. It is our contention that either can complain and that prejudice should be presumed whenever there has been an arbitrary and systematic exclusion of either sex from the jury panel.

Wherefore it is respectfully submitted that the writ of certiorari should be granted.

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